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 SKILLSOFT CORPORATION

11 UNITED STATES DISTRICT COURT  
 12  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14  
 15 SAN FRANCISCO DIVISION

16 IP LEARN, LLC,

17 Plaintiff,

18 v.

19 SKILLSOFT CORPORATION, and DOES 1-10,  
 20 Defendants

Civil Action No. C-02-02632 MJJ

**DEFENDANT SKILLSOFT CORPORATION'S  
 REPLY IN SUPPORT OF ITS MOTION TO  
 DISMISS FIRST AMENDED COMPLAINT  
 OR, IN THE ALTERNATIVE, FOR A MORE  
 DEFINITE STATEMENT**

Date: September 10, 2002  
 Time: 9:30 a.m.  
 Room: Courtroom 11  
 Judge: Hon. Martin J. Jenkins

22 **I. Introduction**

23 SkillSoft has moved this Court for an order dismissing IP Learn's first amended complaint  
 24 or, in the alternative, to require IP Learn to provide a more definite statement of its claims. IP  
 25 Learn's arguments in opposition to SkillSoft's motion do not overcome the inescapable fact that it  
 26 has not complied with Rule 8(a) because it has failed to identify which SkillSoft products,  
 27 software, processes, devices, methods, apparatus or instrumentalities (collectively, the  
 28



“Products”) are allegedly infringing which claims of IP Learn’s patents. IP Learn’s complaint is so vague and ambiguous that SkillSoft cannot reasonably be required to frame a responsive pleading because to do so would require SkillSoft to engage in an extraordinarily burdensome and ultimately wasteful comparison of the more than 240 claims of the patents-in-suit against the many SkillSoft Products rather than the more limited number that IP learn actually expects to put at issue.<sup>1</sup> The Court should dismiss IP Learn’s complaint or, alternatively, order IP Learn to prepare a more definite statement of which SkillSoft Products allegedly infringe which claims of IP Learn’s patents.

## II. Argument

### A. IP Learn Has Failed To Comply With Rule 8(a).

The Federal Rules of Civil Procedure require IP Learn to provide in its complaint a “short and plain statement of the claim” showing IP Learn is entitled to relief. Fed. R. Civ. P. 8(a). Pointing to *Leatherman v. Tarrant* and *Conley v. Gibson*, IP Learn argues that its complaint need not provide any detail regarding the claims upon which its complaint is based.<sup>2</sup> See PLAINTIFF IP LEARN LLC’S OPPOSITION TO DEFENDANT SKILLSOFT CORPORATION’S MOTION TO DISMISS FIRST AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT at 3 (hereinafter “Opp. at \_\_\_”). But *Leatherman* and *Conley* actually require that the complaint “give

<sup>1</sup> IP Learn should have this analysis in its possession if it complied with its Rule 11 obligations. In order to satisfy Rule 11, IP Learn must have determined that at least one of the claims in each of the five patents-in-suit are infringed. To do that, IP Learn had to construe the claims of its asserted patents and apply the claims to SkillSoft Products. See, e.g., *Antonious v. Spalding & Evenflo Cos., Inc.*, 275 F.3d 1066, 1072 (Fed. Cir. 2002).

<sup>2</sup> Apparently attempting to demonstrate that it has met the liberal pleading requirements under the Rules, IP Learn identifies its patents-in-suit with “emphasis added” to the patent titles as if the titles of its asserted patents have something more than administrative significance or somehow inform SkillSoft of IP Learn’s infringement allegations. They do not. See, e.g., *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1312 (Fed. Cir. 1999) (“the purpose of [a patent] title is not to demarcate the precise boundaries of the claimed invention but rather to provide a useful reference tool for future classification purposes” and further referring to the “near irrelevancy of the patent title on claim construction”); see also MANUAL OF PATENT EXAMINING PROCEDURE § 606.01 (Aug. 2001) (referring to a patent title’s “informative value in indexing, classifying, searching, etc.”).



1 the defendant *fair* notice of what the plaintiff's claim is and the grounds upon which it rests.”  
 2 *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168  
 3 (1993), *quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added). IP Learn's attempt  
 4 to identify the allegedly infringing SkillSoft Products by the ambiguous phrase “making, offering  
 5 for sale, selling, and using the inventions patented in” IP Learn's patents fails to provide SkillSoft  
 6 with fair notice of IP Learn's infringement claims sufficient to require SkillSoft to make a  
 7 meaningful response. Thus, the present complaint does not meet the requirements of Rule 8(a).

8 SkillSoft pointed out in its motion that the insufficiency of IP Learn's first amended  
 9 complaint is clear when the allegations in that complaint are compared with the model patent  
 10 infringement allegations in Form 16 of the Federal Rules of Civil Procedure. Form 16 plainly  
 11 requires the plaintiff to identify an infringing product or device. By contrast, IP Learn's  
 12 complaint does not accuse, generally or specifically by name, any SkillSoft Products of  
 13 infringement. Rather, it simply identifies the allegedly infringing SkillSoft Products as  
 14 “inventions patented in” IP Learn's patents. By failing to identify in any way infringing SkillSoft  
 15 Products, IP Learn's complaint fails to meet even the most minimal requirements exemplified by  
 16 Form 16.

17 IP Learn argues that it need not comply with Form 16 because the form is too old, calling  
 18 the form “at best, an anachronistic style of pleading.” (Opp. at 3-4.) By that same logic, Rule 8,  
 19 last substantively amended in 1966, and the landmark case of *Conley v. Gibson*, decided in 1957,  
 20 both of which IP Learn rely on, are also anachronistic law. But recent case law reaffirms that the  
 21 mere passage of time does not amend or make obsolete the Forms contained in the Federal Rules  
 22 of Civil Procedure. *See, e.g., Dome Patent L.P. v. Permeable Tech., Inc.*, 190 F.R.D. 88, 90  
 23 (W.D.N.Y. 1999) (“a complaint that sets forth at least as much information as the complaint in  
 24 Form 16 is therefore sufficient to withstand a motion to dismiss under Rule 12(b)(6) or a motion  
 25 for a more definite statement under Rule 12(e)”).

26 IP Learn alternatively argues that its first amended complaint satisfies Form 16 and cites  
 27 *Oki* and *Beery* as support for its argument. (Opp. at 3-4); *see Oki Elec. Industry Co., Ltd. v. LG*



1 *Semicon Co., Ltd.*, 1998 U.S. Dist. LEXIS 22507 (N.D. Cal. 1998); *Beery v. Hitachi Home*  
 2 *Electronics, Inc.*, 157 F.R.D. 477 (C.D. Cal. 1993). A careful reading of *Oki* and *Berry*, however,  
 3 demonstrates that these cases support the opposite conclusion. In *Oki*, the accused products were  
 4 not alleged as “devices that embody the patented methods,” but rather “devices that embody the  
 5 patented methods, *including 4 megabit and higher density DRAMs.*” *Oki*, 1998 U.S. Dist. LEXIS  
 6 22507, \*9 (emphasis added). The latter allegation, far more specific than IP Learn’s vague  
 7 “inventions patented in,” satisfied Rule 8(a). In *Beery*, the defendants filed an answer on the  
 8 same day they filed their motion for more definite statement. Not surprisingly, the court found  
 9 that “since the Moving Defendants have already filed a responsive pleading, they cannot now  
 10 claim that the complaint is so ‘vague and ambiguous’ that they cannot reasonably be required to  
 11 frame a responsive pleading.” *Beery*, 157 F.R.D. at 480. In this case, SkillSoft has yet to file a  
 12 responsive pleading.

13 Moreover, IP Learn does not even attempt to distinguish the *Ondeo Nalco* and *Dome*  
 14 *Patent* cases cited in SkillSoft’s motion. In *Dome Patent*, the court held that alleging accused  
 15 products as “silicone-acrylate contact lenses embodying oxygen-permeable cross-linkers” set  
 16 forth as much information as Form 16 and was, therefore, sufficient to withstand Rule 12(b)(6)  
 17 and 12(e) motions. *Dome Patent*, 190 F.R.D. at 91. The *Ondeo Nalco* court held that the  
 18 allegation “Nalco’s products, including the 8692 product” used in the paper-making process  
 19 “insufficiently identify[ed] which products are accused of infringement.” *Ondeo Nalco Co. v.*  
 20 *EKA Chemicals, Inc.*, 2001 U.S. Dist. LEXIS 24217, \*2-5 (D. Del. 2001). By contrast, IP  
 21 Learn’s allegation “inventions patented in” is far less specific than the allegation found to be  
 22 insufficient in *Ondeo Nalco* and not even close to the specificity with which the accused products  
 23 were sufficiently alleged in *Dome Patent*.

24 Furthermore, IP Learn’s attempt to distinguish the *Gen-Probe* case also fails. IP Learn  
 25 distinguished *Gen-Probe* on the basis that the complaint in that case “was improper because it did  
 26 not adequately parse out the claims on a *defendant-by-defendant* basis.” (Opp. at 4, fn 2)  
 27 (emphasis original). But this is only part of the *Gen-Probe* court’s holding. IP Learn neglects to



1 mention the *Gen-Probe* court's admonition that "[f]iling a patent infringement action pointing  
 2 vaguely to "products and/or kits . . . does not provide adequate notice as required by the Rules."  
 3 *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 960 (S.D. Cal. 1996).

4 Accordingly, because IP Learn has failed to plead sufficient detail in support of its  
 5 infringement claim, its complaint does not satisfy even the minimal pleading requirements of  
 6 either Rule 8(a) or Form 16, and thus should be dismissed in its entirety.

7 **B. SkillSoft Requires A More Definite Statement To Meaningfully Respond.**

8 As an alternative to its motion to dismiss, SkillSoft has asked this Court to order IP Learn  
 9 to provide a more definite statement specifically identifying which SkillSoft Products infringe  
 10 which claims of IP Learn's patents. IP Learn's vague and ambiguous allegation "inventions  
 11 patented in" shifts to SkillSoft the burden – that properly belongs to IP Learn – of analyzing over  
 12 200 patent claims against the many SkillSoft Products in order to respond in good faith to IP  
 13 Learn's complaint.

14 IP Learn opposes this request by arguing that because the Patent Local Rules require it to  
 15 provide, at a later date, the information SkillSoft requests it is not required to plead this  
 16 information or otherwise provide it to SkillSoft before SkillSoft answers the complaint.  
 17 However, the fact that SkillSoft may be entitled to "flesh[] out during discovery"<sup>3</sup> this  
 18 information neither ameliorates SkillSoft's present burden in meaningfully responding to IP  
 19 Learn's complaint, nor excuses IP Learn's failure to comply with the most basic of pleading  
 20 requirements.

21 Indeed, if IP Learn and other patent plaintiffs could avoid their pleading obligations  
 22 merely by arguing that the Patent Local Rules or the discovery rules in the Federal Rules of Civil  
 23 Procedure require disclosure of certain facts later in a case, defendants would be forced, as  
 24 SkillSoft would be in this case, to attempt to answer vague complaints which fail to comply with

25 <sup>3</sup> See Opp. at 1 ("details underlying [IP Learn's] allegations will be fleshed out during  
 26 discovery").



1 Rule 8(a). Moreover, if this Court were to adopt IP Learn's reasoning, the Patent Local Rules  
 2 would effectively nullify Rule 8(a) and Rule 12(e) because later discovery would always cure any  
 3 pleading deficiencies. Neither the discovery provisions of this District's Patent Local Rules, nor  
 4 the discovery provisions of any other rule, contemplate this result. At the very least, SkillSoft is  
 5 entitled to know which SkillSoft Products allegedly infringe which claims of IP Learn's patents  
 6 *before* it answers the complaint.

7 The relief SkillSoft requests is like the relief granted in the *Pabst Licensing GmbH* case.  
 8 *In re Papst Licensing GmbH Licensing Litigation*, 2001 U.S. Dist. LEXIS 2255, \*3-4 (E.D. La.  
 9 2001). In *Pabst*, the court granted IBM's motion for more definite statement finding that the  
 10 allegation "products that embody the elements of at least one claim" was insufficient in view of  
 11 the over 500 claims and numerous IBM products at issue and ordered the plaintiff to allege  
 12 specific IBM products. *Id.* at 2-4. IP Learn attempts to dismiss the *Papst* holding in a brief  
 13 footnote on the basis that the Eastern District of Louisiana does not have Patent Local Rules like  
 14 this Court which require detailed disclosures of asserted claims and infringement contentions.  
 15 But the discovery rules contained in the Federal Rules of Civil Procedure were applicable in the  
 16 *Pabst* case and all information which is automatically required to be disclosed under this Court's  
 17 local rules could have been obtained pursuant to those discovery rules. Thus, IP Learn cannot  
 18 avoid providing a more definite statement or the *Pabst* holding merely by pointing to the Patent  
 19 Local Rules as a panacea for its pleading deficiencies.

### 20 **III. Conclusion**

21 For the foregoing reasons, SkillSoft respectfully requests that the Court dismiss IP Learn's  
 22 first amended complaint in its entirety or, in the alternative, grant SkillSoft's motion for a more  
 23 definite statement and require IP Learn to specify which SkillSoft Products allegedly infringe  
 24 which claims of the patents-in-suit. At the very least, given that IP Learn's Disclosure of  
 25 Asserted Claims and Preliminary Infringement Contentions are due October 23, 2002, SkillSoft  
 26 respectfully requests that the Court extend SkillSoft's time to answer the complaint to a date

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2 sufficiently after this deadline to allow SkillSoft time to assess IP Learn's claims of infringement  
3 and prepare an answer thereto.

4 Dated: August 27, 2002

FENWICK & WEST LLP

5  
6 By: s/Heather N. Mewes

7 Attorneys for Defendant  
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